

1 BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

2 NANCY KEENAN

3 STATE OF MONTANA

4 * * * * *

5	DONNA KLOKER,	}	
6	Counter-Appellant)	OSPI 179-89
7	and Respondent,)	<u>DECISION AND ORDER</u>
8	v.)	
9	BOARD OF TRUSTEES,)	
10	GARFIELD COUNTY HIGH)	
11	SCHOOL,)	
	Counter-Respondent)	
	and Appellant.)	

12 * * * * *

13 STATEMENT OF THE CASE

14 Donna Klover ("Klover") was a full-time, tenured special
15 education teacher in the Garfield County High School. On or about
16 March 15, 1989, The GCHS Board of Trustees ("Trustees"), acting
17 on a recommendation of Superintendent Cascaden to eliminate the
18 position of high school special education teacher for the 1989-
19 90 school year, terminated Klover. Notice of termination preceded
20 any opportunity for hearing. The Trustee's decision was based on
21 a desire to eliminate the position in order to pursue a K-12
22 special education program. A low child count in the high school
23 special education program did not require a full-time special
24 education teacher. Klover does not have endorsement in elementary
25 special education.

1 Klokner appealed her termination to the County Superintendent.
2 Acting Superintendent Shirley Barrick found that the trustees had
3 "substantially complied" with the requirements of Section 20-4-
4 204, MCA, and ordered that Klokner be offered the part-time high
5 school special education position.

6 Both parties have appealed the decision of the County
7 Superintendent.

8 DECISION AND ORDER

9 There is substantial and reliable evidence on the record to
10 support the findings of fact of the County Superintendent and her
11 conclusions that a part-time position exists in the high school.
12 The County Superintendent's conclusion of law that the district's
13 "substantial compliance" with the requirements of Section 20-4-
14 204, MCA, was adequate to terminate a tenured teacher is affected
15 by an error of law and is hereby reversed. The ORDER of the
16 County Superintendent is modified. The Trustees shall reinstate
17 Klokner to the part-time special education position at Garfield
18 County High School and shall give her backpay and benefits for
19 the part-time special education teacher position for the 1989-90
20 school term.

21 MEMORANDUM OPINION

22 The standards for review by the State Superintendent are set
23 forth in 10.6.125, ARM.

24 This rule was modeled upon Section 2-4-704, MCA, and the
25 Montana Supreme Court has interpreted the statute and the rule to

mean that agency (County Superintendent) findings of fact are subject to a clearly erroneous standard of review and that conclusions of law are subject to an abuse of discretion standard of review. ~~Harris v. Bauer~~, ___ Mont. ___, 749 P.2d 1068, 1071, 45 St. Rptr. 147, 151, (1988); City of Billings v. Billings Firefighters, 200 Mont. 421, 430, 651 P.2d 627, 632 (1982). Further, the petitioner for review bears the burden of showing that they have been prejudiced by a clearly erroneous ruling. Perry v. Board of Regents, 220 Mont. 214, 217, 714 P.2d 151, 153 (1986) citing ~~Carruthers v. Board of Horse Racing~~, ___ Mont. ___, 700 P.2d 179, 181, 42 St. Rptr. 729 (1985). Findings are binding and not "clearly erroneous" if supported by "substantial credible evidence in the record." Id. This has been further clarified to mean that a finding is clearly erroneous if a "review of the record leaves the court with the definite and firm conviction that a mistake has been committed." Wage Appeal v. Bd. of Personnel Appeals, ___ Mont. ___, 676 P.2d 194, 198 (1984). A conclusion of law is controlling if it is neither arbitrary nor capricious. City of Billings, 651 P.2d at 632.

Kloker was a tenured special education teacher employed in the Garfield County High School. On March 14, 1989, the Trustees approved the written recommendation of Superintendent Cascaden and terminated the teaching position held by Kloker. On March 15, the Trustees notified Kloker in writing that her position as a high school special education teacher was terminated. A hearing

1 was set for March 30, 1989. Upon agreement of the parties a
2 hearing was held March 23, 1989, at which time the Trustees
3 unanimously voted "to stay with the former decision and go with
4 the Superintendent's recommendation." Transcript page 15.

5 The acceptance by the Trustees of the recommendation of the
6 superintendent and the termination of Klover, a tenured teacher,
7 prior to notifying the teacher of the recommendation and providing
8 opportunity for a hearing, clearly violated Section 20-4-204, MCA.
9 That statute guarantees tenured teachers a pre-termination hearing
10 prior to any decision by the board. It provides in part:

11 20-4-204. Termination of tenured teacher services.
12

13 (2) Whenever the trustees of a district receive a
14 recommendation for termination, the trustees shall, before
15 May 1 of the current school fiscal year, notify the
16 teacher of the recommendation for termination and of the
17 teacher's right to a hearing on the recommendation.

18 ...

19 (4) The trustees shall:

20 ...

21 (b) resolve at the conclusion of the hearing to terminate
22 the teacher or to reject the recommendation for
23 termination.

24 ...

25 The Montana Supreme Court has interpreted this statute in

1 two recent cases, Michael Birrer v. Trustees, Wheatland County
2 School District No. 16, (Mont. 1990), _____ 47 St. Rptr. 247
3 and Raymond Harris v. Trustees, Cascade County School Districts
4 No. 6 and F. St. Rptr. **Ed.** L. 246 (1988) and stated that the
5 statute "comprehends that the Board of Trustees not make a
6 decision respecting a recommendation for the termination of a
7 tenured teacher until after a hearing." Birrer. The Court
8 explained that Section 20-4-204, MCA, defines the specific
9 procedure to be taken to terminate a tenured teacher and that
10 irregularities affecting that due process will not be tolerated.

11 In both the Birrer and Harris cases the Court affirmed the
12 terminations notwithstanding the violation **of** the termination
13 statute on narrow grounds particular to the cases. The facts in
14 the Harris case differ from those in this case in only one
15 respect. In Harris the school district created a new half-time
16 teaching position that replaced the former full-time position.
17 In the case before me, the high school district has contracted
18 with the elementary district for the part-time services required.
19 The termination of Kloker was due to the reduced number of
20 students to be served and was not for any personal reason. There
21 **is** no evidence in the record to refute the low child count.
22 Following the guidelines set down by the Supreme Court in Birrer
23 and Harris, the termination is affirmed because under the facts
24 established in the record, the procedural errors committed did not
25 cause Kloker substantial prejudice.

1 Although the record is replete with testimony regarding some
2 alleged failure on the part of Kloker to obtain certification for
3 K-12, this is irrelevant to the issue of her contract and tenure
4 as a high school special education teacher. A school district
5 may not ignore tenure and in an attempt to save money enter into
6 a contract for the very services that have been provided by the
7 censured teacher.

8 The decision in Massev v. Argenbright, 211 Mont. 331, 337, 683
9 P.2d 1332, 1335, (1984) is controlling and requires that Kloker
10 be offered the part-time position remaining. Like the position
11 taken by the Court in Harris, to allow a school district to
12 eliminate a full-time position and create and fund a contract
13 position would be to allow a circumvention of the tenure rights
14 of this teacher. To say that no new position exists is a
15 "hypertechnical distinction" of the type the court found in Harris
16 would seriously threaten the value of tenure.

17 DATED this 21 day of May., 1990.

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19 Nancy Keenan
NANCY KEENAN
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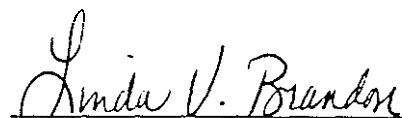
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 21st day of May, 1990, a true and accurate copy of the foregoing Decision and Order was mailed, postage prepaid to the following:

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